

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Progeny LMS, LLC)	File No. 0002049041 et seq. ¹
Waiver Requests for Extension of the)	
M-LMS Five-year Construction)	
Requirement		

To: Office of the Secretary
Attn: Chief, Wireless Telecommunications Bureau

Opposition
*Erratum Version***

Warren Havens (“Havens”), Telesaurus Holdings GB, LLC (“THL”), Telesaurus-VPC, LLC (“TVL”), AMTS Consortium LLC (“ACL”), and Intelligent Transportation & Monitoring Wireless LLC (“ITL”)s (together the “Opponents”)² jointly and severally submit this opposition (the “Opposition”) to the above-captioned waiver request applications of Progeny LMS, LLC (“Progeny”) to extend the five-year construction requirement deadline (the “Construction Requirement” and the “Deadline”) of all of Progeny’s Multilateration Location and Monitoring Service (“M-LMS”) licenses (the “Progeny Licenses”) (the “Extension Request”). This is submitted pursuant to the settlement agreement regarding FOIA Control No. 2005-449 (an FOIA request submitted by Havens) among Progeny, Havens (for

¹ This is the first file number of these applications, filed 2-15-05, as listed on ULS.

*** Additions boxed; deletions in strikethrough; text aligned; page numbers added.*

himself and the above noted LLC entities he controls) and the FCC Wireless Telecommunications Bureau (the “Bureau”) via email exchange reached on or about November 14, 2005 (the “Settlement”).

Summary

Progeny simply chose to abandon in full the requirements of M-LMS after it bought the Licenses under such requirements. Further, for the majority of its Licenses term to date, and to this day, it actively and publicly characterized M-LMS and these requirements as a failure. It sought and still seeks exclusive-spectrum CMRS-like “flexibility” in a shared-use band where structured uses are essential, and are already appropriately structured in existing M-LMS and related Part 15 rules. That is the goal of the Extension Request, not to provide M-LMS service under current rules. When the Commission did not buy into that, Progeny asked for this Extension Request suggesting it was diligently attempting to meet the very requirements [it] asserted were failures and it continued to seek to change. Understandably, its due-diligence materials submitted in support of the Extension Request are devoid of any effort to obtain or even express to outside parties the required M-LMS multilateration equipment: the only equipment that can satisfy the Construction Requirement.

There is no more clear case for not granting an extension request. It far exceeds in lack of any basis for grant the many extension requests rejected by the Commission in published precedents, some of which are discussed below.

² Havens is the majority interest holder and President of THL, TVL, ACL, and

The Commission should maintain the spectrum in the Progeny Licenses for M-LMS, reclaim the spectrum, and auction it again.

Background, Standing and Interest

The Settlement provided the right for submitting this Opposition and for its consideration by the Bureau. The FOIA request and related Settlement involved Havens, THL, TVL, and ACL. They thus have standing. In addition, Havens also controls ITL. ITL has interest and standing for the reasons next explained below, and such reasons further demonstrate standing for Havens, THL, TVL, and ACL.

Each of the Opponents hold FCC wireless authorizations³ in large parts of the nation in Progeny Licenses' geographic markets. Progeny's M-LMS Licenses may be used to compete with some services authorized by all of Opponents' M-LMS, AMTST, 220 MHz, MAS and VPC licenses, since all of these classes of service allow two-way voice and data, and require (M-LMS) or allow multilateration-based location service. Their joint business plan is entirely consistent with the purpose the Commission established after extensive rulemaking and consideration for M-LMS.⁴ Progeny has sought and to this day maintains an aggressive attempt to

ITL.

³ Havens holds M-LMS, VPC, and 220 MHz licenses. THL and TVL hold M-LMS licenses and VPC licenses. ACL and TVL hold AMTS licenses from Auction 57. Grant of ITL's MAS licenses from Auction 59 has been approved, but the licenses not yet awarded due to ITL seeking tribal land bidding credits, pursuant to which the time to obtain and present tribal certificates has not yet run. Grant of ITL's and ACL's long forms for licenses from Auction 61 has not yet been approved, is expected.

⁴ Petitioners goals for all of the licensed spectrum they hold involves regional systems, eventually joined nationwide, using standards-based advanced location

change M-LMS rules which would change the purpose and use of M-LMS spectrum in the nation. This change would undermine the character and purpose of M-LMS: regardless of whether or not this change would require Havens and THL to change their pursuit of ~~this~~ their goals⁵ note above, it would clearly allow Progeny the “flexibility” to pursue services and use technology not current allowed and abandon M-LMS as the Commission intended and as required under current rules. This would cause a drastic and highly damaging split in M-LMS as a service, with Havens and THL pursuing M-LMS as intended, for advanced wide-area vehicle-based location, monitoring, and associated communication services (mainly for mission-critical entities in public safety and service) and Progeny pursuing whatever “flexible” opportunities it wanted, which is most likely to be a sale of its spectrum to a company pursuing more commercial service if Progeny or such buyer obtains rule changes. This split would seriously damages M-LMS as a service.

M-LMS is unique not only for its special focus on, and limitation to, private vehicle- based wide-area location and communication service, but for it being in a band, 902-928 MHz, with a hierarchy of licensed and unlicensed uses. M-LMS is secondary to Federal rights, and ~~NTIA~~ NTIA has not given any of these up. (Opponents plan noted above includes expanded and improved use of the band by

and wideband communication technologies, for use by public safety (including Intelligent Transportation System), critical infrastructure, and major enterprise entities on the basis of shared virtual private networks in public-private-nonprofit partnerships. These goals and plans have been presented in papers and meetings to staff at the FCC, NTIA, US Coast Guard, US Department of Homeland Security, US Department of Interior, APCO, and the major telecom trade organizations for

Federal entities.) There are substantial uses of 902-928 MHz by Part 15 systems, some at considerable power (the maximum allowed for some devices and modulation under applicable Part 15 rules and under the Safe Harbor in Part 90 LMS rules is 1 watt/ 6 dBi—higher than used by most all 3G and other advanced wireless enduser devices) and M-LMS must remain focused on wide-area service to vehicles, since that affords a spatial separation with Part 15 devices used, as they are, in local private areas or in high-traffic public areas⁵. M-LMS at its licensed higher power is ideal for very wide area links to vehicles (which also can use high power when needed, and gain antennas), and the same spectrum can be used by Part 15 systems in more localized areas that where, with few exceptions, will not be close to vehicles when the vehicle radios are used. This was thought out and articulated by the Commission, in heated debate with Part 15 and LMS licensed interests, in coming up with the current M-LMS (and nonmultilateration) rules.

Contrary to Progeny in RM-10403, M-LMS-M, including its required multilateration, is not an obviated service, nor is M-LMS as intended (as summarized above) incompatible with Part 15 uses or vice versa. The FCC Spectrum Task Force report (fall, 2002) was entirely correct that one form of advanced spectrum-efficient wireless will involve coordination in the subject band of higher power and lower power uses.

See also the Opponents Past Filings described next below: these describe in further detail the matters summarized above in this Section.

US utilities, railroads, and other critical infrastructure. M-LMS is central to these

For the above reasons, the Opponents have a strong interest in and standing in this matter, and Progeny should not be permitted to extend its attempt, by grant of the Extension Request, to radically and harmfully change the M-LMS service.

Opponents' Past Filings Incorporated Herein

See the Attachment hereto that lists previously submitted filings to the Bureau in the matter of the Extension Request and RM-10403 (the "Opponents' Past Filings"). These present Opponents reasons for denial of the Extension Request, which Opponents incorporate in full in this Opposition. The Opponents' Past Filings have sections ~~on~~ further discussing background matters, summarily discussed above, and the need for due diligence and applicable precedents, summarily discussed below.

Progeny Due Diligence Filings Provided under the FOIA Request

Contrary to suggestions in the Extension Request, the documents Progeny submitted to the FCC (exclusive of the materials that Progeny withdrew and the Bureau accepted as withdrawn)⁵ do not evidence any due diligence of any kind to search for, develop, acquire, or even conceive of M-LMS multilateration equipment needed to meet the Construction Requirement.

Also, these materials do not provide evidence of any substantial communication or investigation to obtain any equipment, or of any substantial

goals and plans.

⁵ Email from R. Arsenault to Havens 11-29-05, copied to counsel for Progeny.

expenditure or contractual commitments, or of any confidential arrangements, even nondisclosure agreements.

Applicable Precedents

FCC case law establishes that the Extension Request cannot be granted. The following are some relevant precedents. Others are provided in the Opponents' Past Filings. Measured by these precedents, the Extension Request clearly fails for reasons summarized above and further discussed in the Opponents Past Filings. (Cases cited first below in brief are fully cited later below.)

Licensees who do not order equipment sufficiently in advance of the deadline do not demonstrate due diligence. In re Redwood Wireless at para 8; In re Eldorado at para. 8.

Where the equipment does not yet exist -- or is unavailable in sufficient quantities -- but will be available shortly, the FCC may grant a waiver. In re FCI 900, Inc at para. 7.

However, merely speculative assertions are not sufficient. The licensee should demonstrate that alternative equipment has been sought. In re Motient at para. 12. See also FN43 and associated text -- the FCC is most likely to grant extension where the licensee is attempting to offer advanced services.

Licensee's argument as to unavailability of equipment is speculative; no waiver granted: when equipment supplier ceased production of relevant equipment,

licensee did not seek other sources of equipment. In re Motient, 19 FCC Rcd 13086 (2004);⁶

Extension request denied for Licensee who waited too long to start equipment search: In re Redwood Wireless, 17 FCC Rcd 22416 (2002);⁷ Also, In re Eldorado Communications, Inc., 17 FCC Rcd. 24613 (2002).⁸

Waiver granted where relevant equipment (900 MHz SMR digital voice equipment) unavailable in sufficient quantities to meet deadline, but it will be available "soon." Also, this was an industry-wide problem; many parties affected. In re FCI 900, Inc., 16 FCC Rcd. 11072 (2001).⁹ Also, waiver granted due to lack of viable new equipment, but after extensive attempts at using old equipment, and in part because many licensees were requesting.¹⁰

For the above reasons, the Extension Request should be denied.

⁶ IN THE MATTER OF MOTIENT COMMUNICATIONS INC., Request for a Waiver and Extension of the 800 MHz Construction Requirements, DA 04-2124, Released: July 14, 2004.

⁷ IN THE MATTER OF REDWOOD WIRELESS MINNESOTA, L.L.C. AND REDWOOD WIRELESS WISCONSIN, L.L.C., Order, DA 02-3040, Released: November 7, 2002, 17 FCC Rcd. 22,416.

⁸ IN THE MATTER OF ELDORADO COMMUNICATIONS, L.L.C., Request for a Waiver and Extension of the Broadband PCS Construction Requirements, Order, DA 02-3370, Rel. December 5, 2002.

⁹ IN THE MATTER OF FCI 900, INC. EXPEDITED REQUEST FOR 3-YEAR EXTENSION OF 900 MHZ BAND CONSTRUCTION REQUIREMENTS AND NEOWORLD . . . MO&O, DA 01-1297, Released May 25, 2001. 16 FCC Rcd. 11,072.

¹⁰ In the Matter of Request of Warren C. Havens for Waiver or Extension of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees . . . , MO&O, DA 04-2100, Rel. July 13, 2004

Respectfully submitted,

[\[Submitted Electronically. Signature on File\]](#)

Warren C. Havens, Individually and as President of
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AMTS Consortium LLC
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November 29, 2005

Declaration

I, Warren C. Havens, hereby declare under penalty of perjury that the foregoing *Opposition* including all the Attachments and referenced incorporated documents were prepared pursuant to my direction and control and that all the factual statements and representations contained herein attributed to my knowledge, as the text or context makes clear, are true and correct.

[Submitted Electronically. Signature on File.]

Warren C. Havens

Date: 29 November 2005

Attachment

List of “Opponents’ Past Filings” (defined in text above)

The below ~~six~~ seven documents are incorporated in full in this Opposition.

The first ~~three~~ four are most directly relevant to Opponents opposition of the Progeny Extension Request. The last three are relevant directly to the Progeny rulemaking request in RM-10403, but are also essential to Opponent’s position with respect to the Extension Request, including since the Extension Request must be viewed in light of Progeny’s position in its rulemaking request which Progeny has maintained all throughout the Extension Request proceeding.

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|--|
| 1) “Informal Reply to Opposition to Request for Public Notice or Alternative Action” filed by Warren Havens via email to wtbsecretary@fcc.gov on 6/14/05, regarding File No. 0002049041 et al. |
|--|
- 2) Email with subject “Request under Sec. 1.41: (1) Clarification, (2) Progeny ex parte filings” filed by Warren Havens on 5/15/05 with the Commission’s Secretary at wtbsecretary@fcc.gov (Cc: to Thomas Derenge with the FCC and Progeny counsel), regarding File No. 0002049041. Also filed in RM-10403 via ECFS on 5/16/05. 3 pages.
 - 3) “Request Under Section 1.41 To Place on Public Notice or Alternative Action” filed by Warren Havens via email on 5/2/05 with the Commission’s Secretary at wtbsecretary@fcc.gov (Cc: to Thomas Derenge with the FCC and Progeny counsel), regarding File No. 0002049041 et seq. 19 pages.
 - 4) Email with subject “Re: FCC extension request [of Progeny LMS LLC]” filed by Warren Havens in RM-10403 via ECFS on 3/30/05. Also sent via email on 3/30/05 to Progeny counsel and cced to Thomas Derenge with the FCC. 4 pages.
 - - - - -
 - 5) Email with subject “New filings, LMS extension, and RM-10403” filed by Warren Havens on 10/25/04 to Thomas Derenge with the FCC (Cc to Peter Tenhula and Richard Arsenault with the FCC). Also filed in RM-10403 on 10/25/04 via ECFS. 2 pages.
 - 6) Email with subject “RM-10403/Havens-Telesaurus” filed by Warren Havens on 8/24/03 to Bryan Tramont with the FCC. Also filed in RM-10403 on 8/25/03 via ECFS. 2 pages.
 - 7) Letter with Subject “RM-10403 (902-928 MHz)” filed by Warren Havens in RM-10403 via ECFS on 8/11/03, and addressed to “FCC: David Furth,

Kathleen Ham, Richard Arsenault, Paul D'Ari, Julie Knapp” (also sent via email to the FCC-email for each staff person).

Certificate of Service

I, Warren Havens, hereby certify that I have, on this day, November 29, 2005, placed into the USPS mail system, unless otherwise noted, a copy of the foregoing *Opposition* to Progeny Extension Waiver Request, with First-class postage prepaid affixed, to the following:

Office of the Secretary
Federal Communications Commission
445 12th St., SW, Room TW-B204
Washington, D.C. 20554

(Via email only to WTBSecretary@fcc.gov pursuant to Order, FCC 01-345)

Richard Arsenault
Wireless Telecommunications Bureau
445 12th St., SW, Room 4-B408
Washington, D.C. 20554

(Via email only to Richard.Arsenault@fcc.gov)

Progeny LMS, LLC
Janice Obuchowski
Halprin Temple
1317 F Street NW
Washington, DC 20004

(Also via email to JO@ftidc.com)

[\[Filed electronically. Signature on file.\]](#)

Warren Havens

The above is in accord with the settlement agreement regarding Opponents' FOIA request in this matter, which provides:

Filing of the comment cycle pleadings would be by e-mail under the procedures

- ☐ set forth in FCC 01-345* (e-mail to wtbsecretary@fcc.gov) with a cc copy to
- ☐ Mr. Richard Arsenault at Richard.Arsenault@fcc.gov and to the other party
- ☐ (as noted below). Parties would serve each other on the date of the filing by providing
- ☐ a copy by US mail or private courier. The Certificates of Service would reflect the
- ☐ process described above. E-mailed copies to Progeny would be sent to Ms. Janice
- ☐ Obuchowski at JO@ftidc.com , and e-mail copies to Mr. Havens would be sent to
- ☐ Counsel to Mr. Havens, Ari Fitzgerald, at AQFitzgerald@hhlaw.com , with copies to
- ☐ Mr. Havens at wchavens@aol.com and jstobaugh@telesaurus.com . In addition,

- ☐ on the same day as they are transmitted to the recipient, an electronic copy of the
- ☐ Progeny withdrawal request and Wireless Bureau acceptance, as noted above, would
- ☐ be transmitted by e-mail to Mr. Havens at the three e-mail addresses provided above.